No. 13880

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine,

Appellant,

vs.

MARIE DESYLVA,

Appellee.

MARIE DESYLVA,

Appellant,

vs.

MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine,

Appellee.

APPELLANT'S OPENING BRIEF.

FINK, LEVINTHAL & KENT,
6253 Hollywood Boulevard,
Los Angeles 28, California,
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Jurisdiction.

This appeal is from a summary judgment granted to defendant and appellee Marie DeSylva and involves an interpretation of the copyright laws of the United States, particularly Section 24 of Title 17 of United States Code. Complaint was filed under the Federal Declaratory Judgment Act, Section 2201 of Title 28, U. S. C., by Marie Ballentine, as Guardian of the Estate of Stephen William

Ballentine, a minor, seeking a declaration of the respective rights of said minor and defendant with respect to the renewal rights to certain musical copyrights owned, during his lifetime, by George G. DeSylva, deceased. [R. 1-7.] Decedent was the father of said minor and defendant was the widow of said decedent. Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1338(a). On May 11, 1953, Notice of Appeal was filed on behalf of Marie Ballentine, as Guardian of the Estate of Stephen William Ballentine, plaintiff, pursuant to the provisions of Section 1291 of 28 U. S. C. [R. 35.]

Statutes Involved.

The pertinent portion of Title 17, U. S. C., Section 24, providing for the renewal of copyrights is as follows:

> "DURATION; RENEWAL AND EXTENSION
>
> "The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name. . . . *And provided further,* That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright. . . ."

Statement of the Case.

The facts are not in dispute. The complaint alleged that Stephen William Ballentine, a minor, was the son of George G. DeSylva, deceased, who died July 11, 1950, and that defendant Marie DeSylva was the widow of decedent. Decedent, during his lifetime, owned many copyrights on musical compositions. The complaint sought a declaration of the respective rights of the minor and defendant to renewals of such copyrights effected after the death of decedent. The dispute set forth was that defendant claimed the exclusive renewal privilege to such copyrights, whereas plaintiff asserted that the minor was entitled to share equally with defendant therein. [R. 1-7.]

Both plaintiff and defendant made motions for summary judgment. [R. 14-27.] Plaintiff's motion was denied and that of defendant was granted. [R. 33.] The trial court, on a matter of first impression, based its ruling on its interpretation of Section 24 of Title 17, U. S. C., which confers the renewal rights in question. The trial court interpreted the language of that Section, which is set forth above, as giving the surviving widow or widower of an author the sole right to renewals on copyrights effected after the author's death so as to exclude the children of the author therefrom.

Questions Presented.

1. Where an author leaves surviving a widow or widower and child, does the copyright act permit both to participate in the renewals of the copyrights accruing after the death of the author, or is the widow or widower entitled to the sole rights to such renewals to the exclusion of the child?

2. If the widow and child are to share in the renewals, should the widow be ordered to account with respect to renewals obtained by her.

Specification of Errors.

1. That the Court erred in finding that an accounting by defendant with respect to the copyrights and renewals thereof on decedent's musical compositions, as well as monies received therefrom, is not necessary. [Finding VIII, R. 31.] This finding is in error because the Court should have found that the minor child was entitled to share with defendant in those renewals from which it would follow that an accounting was due from defendant to said minor.

2. That the Court erred in finding that the defendant is the sole owner of the right to renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest. [Finding IX, R. 31.] This was erroneous in that the Court should have found the minor child was entitled to share with defendant in those renewals and extensions.

3. That the Court erred in holding that so long as defendant, Marie DeSylva, is alive, said defendant is the sole owner of all right to renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest. [Conclusion of Law 1, R. 31.] This was erroneous for the reason, as above, that the minor child should be entitled to share in such renewals and extensions.

4. That the Court erred in holding that plaintiff herein has no right to an accounting from defendant for monies or benefits obtained as a result of renewals and extensions of copyrights obtained by defendant and in further holding

that plaintiff is not entitled to an accounting of any such renewals or extensions of copyrights in the future so long as said defendant is alive. [Conclusion of Law 3, R. 32.] This is erroneous for the reason that an accounting would follow if it be held the minor child was entitled to share in such renewals or extensions.

5. That the Court erred in rendering judgment for defendant.

6. That the Court erred in failing to rule that plaintiff was at least equally entitled with defendant to the renewals and extensions of copyrights in which George G. DeSylva had an interest, which renewals and extensions were effected after his death.

7. That the Court erred in failing to rule that plaintiff was entitled to an accounting from defendant in connection with such renewals and extensions of copyrights obtained by defendant.

Summary of Argument.

The language used in the statute is sufficiently intelligible and plain to demonstrate the intention of Congress that the widow or widower should not have precedence over the children of an author with respect to renewal rights. In addition, a consideration of the objects and policy of the statute, as well as of equity and conscience, affirm such intention. Since the child of an author should be held to be equally entitled to share in the renewals of the copyrights with the defendant, defendant should be ordered to account for the renewals already obtained by her since the death of the author.

ARGUMENT.

I.

The Statute Does Not Give the Widow or Widower Precedence on the Renewal of Copyrights to the Exclusion of the Children of the Author.

A. The Intent of Congress as Reflected in the Language of the Statute Is That No Precedence as Between Widow, Widower or Child of the Author Was Intended.

> "The intention of the Congress is to be sought for primarily in the language used and where this expresses an intention reasonably intelligible and plain, it must be accepted without modification by resort to construction or conjecture."[1]

Although it may be contended that the language of the statute is not completely free from ambiguity, the language nevertheless expresses the intention of Congress, reasonably intelligible and plain, that the widow or widower is not to have priority on renewals of copyrights to the exclusion of the children of an author. Such intention is demonstrated in the statute by unmistakably indicating the priority of each particular group or class entitled to the renewal privilege by the use of a qualifying phrase inserted between groups.

Thus, the person first entitled is the author, if still living. The next group or class of widow, widower, or children, becomes entitled "if the author be not living." Then comes the author's executors, "if such author's widow, widower, or children be not living." The next of

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[1] *Thompson v. United States,* 246 U. S. 547, 551, 38 S. Ct. 349, 351, 62 L. Ed. 876.

kin follow "in the absence of a will." In this manner the order of priority is carefully delineated.

No such qualifying phrase is found within the group or class of widow, widower, or children. If priority within the group had been intended, a similar qualifying phrase indicating priority in this instance would have been employed just as it was used to indicate priority between the groups. The statute would then have read substantially as follows:

> "That . . . the author of such work, if still living, or the widow or widower of the author, if the author be not living, or if such author, widow or widower be not living, the children of the author, or if such author, widow, widower, or children be not living, then the author's executors. . . ."[2]

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[2]"Whether the widow takes precedence over the children in renewing the copyright has not been adjudicated, although this question is constantly troubling the Copyright Bar. The sound and only proper view is that the widow and children are members of the same class, any member of which can apply for the renewal and obtain legal title to the renewal, but he will be deemed a trustee thereof for the other members of the class. If it were the intention to give the widow precedence over the children, the Act would have so stated. The section would then have read, that the widow could renew, if the author is not living, or if neither the author or widow is living, then the renewal should be by the children.

"The injustice of holding otherwise is evident in the case where an author had been married several times and was survived by children by a prior marriage.

"Could it be said that the Act intended that the wife who was the widow at the death of the author should take the entire renewal to the exclusion of the children by a prior marriage? Where the widow and several children survive, and one child files a renewal, he holds the legal title for himself as trustee for the widow and each of the other children." (*Tannenbaum*, Practical Problems in Copyright, CCH Law Handybook—7 Copyright Problems Analyzed (1952), pages 7, 12. See also 2 *Warner*, Radio and Television Rights, 246, Sec. 81; 2 *Socolow*, The Law of Radio Broadcasting, page 1218. *Cf. Silverman v. Sunrise Pictures Corp.* (2nd Cir., 1921), 273 Fed. 909, 912, cert. den. 262 U. S. 758, 43 S. Ct. 705, 67 L. Ed. 1219.)

This is rendered all the more apparent when it is noted that an earlier draft of the statute read as follows:

> "That the copyright . . . may be further renewed and extended by the author, if he be still living, or if he be dead, leaving a widow, by his widow, or in her default or if no widow survive him, by his children. . . ."[3]

The fact that this specific provision was proposed and dropped in favor of the present language additionally demonstrates the intention to group the children and widow or widower in a single class, and further that, although the statute provides an order of enumeration, that order of enumeration is by classes.

Although direct case authority on this point is lacking, we do find that it has been assumed (without expressly passing on the point) that the widow, widower or children took together as a class. Thus, in *Edward B. Marks Music Corporation v. Jerry Vogel Music Company, Inc.*,[4] the Court first pointed out that there was no proof that the deceased co-author left no widow or children surviving him and then went on to state:

> "Under the statute the right of renewal vested in *them* to the exclusion of the brother if *they* survived the co-author." (Emphasis supplied.)

In *Harris v. Coca-Cola Company*,[5] the Court pointed out that the original Copyright Act provided for renewals

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[3]Section 19 H. R. 19853 and S. 6330, 59th Congress, First Session, entitled "A Bill to Amend and Coordinate the Acts Respecting Copyright."

[4]47 Fed. Supp. 490, 492 (Dist. Ct. N. Y., 1942), affd. 140 F. 2d 266, 268 (2nd Cir., 1944).

[5]73 F. 2d 370, 371 (5th Cir., 1934), *cert. den.* 294 U. S. 709, 55 S. Ct. 406, 79 L. Ed. 1243.

and extensions in the author himself but later acts added the widow and children as beneficiaries if the author be dead.

In the absence of direct case authority, the construction by those charged with the duty of executing the statute is entitled to persuasive weight and ought not to be overruled without cogent reasons.[6] That agency in the instant case is the Copyright Office. The Copyright Office has taken the position that the order of enumeration specified in the statute is by classes and that the children and widow or widower are to be taken as a single class for renewal purposes;[7] further, that the widow or widower does not take precedence over the children in asserting renewal claims; and that the benefits of the renewal are

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[6]*Billings v. Truesdell* (1944), 321 U. S. 542, 552, 64 S. Ct. 737, 743, 88 L. Ed. 917; *Turnbull v. Cyr* (9th Cir., 1951), 188 F. 2d 455, 457; *Hoague-Sprague Corporation v. Frank C. Meyer Co.* (Dist. Ct. E. D. N. Y., 1929), 31 F. 2d 583, 585. See also *Bent v. C. I. R.* (9th Cir., 1932), 56 F. 2d 99, 102.

[7]The following is an excerpt from Circular No. 15 of the Copyright Office entitled "Instructions for Securing Registration of Claims to Renewal Copyright":

> "The following persons are entitled to claim a renewal copyright: 1. Aside from the groups of works mentioned in Paragraph 2, below, renewal copyrights in all works (including works by individual authors which appeared in periodicals or in cyclopaedic or other composite works), may be claimed by the following groups of persons: a. The author of the work, if he is still living at the time when renewal is sought. b. If the author is not living, his widow (or widower) or children may claim renewal. c. If neither the author, his widow (or widower), nor any of his children are living, and the author left a will, the author's executor may claim renewal. d. If the author died without leaving a will, and neither his widow (or widower) nor any of his children are living, his next of kin may claim renewal."

held as tenants in common so that if one of the class renews, he does it for the benefit of all.[8]

Defendant has based her contention that the widow or widower takes precedence over the children on the argument that the language referring to the group of "widow, widower, or children" employs the coordinating particle "or" and that such word is used in the disjunctive, meaning an alternative. In this connection we note, first, that "or" used as an alternative does not denote a priority

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[8]This position is set forth by George D. Cary, Principal Legal Advisor to Copyright Office, in letters sent to counsel for both parties herein, as follows [see R. pp. 8 to 10].

> "It has always been the position of the Copyright Office, as expressed in our information circulars and correspondence, that a deceased author's widow and children are to be regarded as a single class for renewal purposes, and that the widow takes no precedence over the children in asserting renewal claims. While the instructions appearing on page 2(a) of Form R may not make this clear, the fact that the widow and the children are treated as separate, in stating the language to be used for asserting renewal claims, should not be interpreted as an implication that the one is to be preferred over the other. Our Circular 15 treats them as a single renewal category.
>
> "We express this position in daily practice by accepting the renewal claims of an author's widow, and those of his children, on the same application. It is perhaps significant, in this connection, to note that if we regard two claims as basically conflicting, we will register them, but not on the same application. Likewise, we raise no question concerning joint widow-children claims and register them without correspondence. This differs from cases where a claim is asserted contradicting one which has already been registered, since we make a practice of requesting an explanation in such instances, before proceeding with entry of the inconsistent claim.
>
> "This is not to say that we regard our position as the only possible one, or that we rule out the possibility that a court may adopt the opposite position. However, we do feel that, in the absence of any direct authority, our present position is more probably correct. Likewise, it accords with our rule

unless we modify the language employed by reading into it some qualifying phrase such as "or if no widow or widower survive, then the children. . . ."[9] To do so would, of course modify the language used in the statute by construction.

Secondly, it is well established that the conjunctive and disjunctive are signified by the use of the word "or" if to do so is consistent with the legislative intent.[10]

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of registering claims in doubtful cases since, if we adopted the opposite conclusion, we would be forced to reject outright the entry of certain claims.

"There is no direct authority on this point, although the commentators seem to be in general agreement that the widow and children are to be regarded as a single class, and are to hold the benefits of the renewal as tenants in common. Concededly, the language of the statute is not without ambiguity, although perhaps the more persuasive construction would seem to treat the claimants as one group. On the other hand, at least one aspect of the legislative history of the provision appears to support our position. The present language of the Section was substituted for that used in an earlier draft of the statute, which read: '. . . that the copyright . . . may be further renewed and extended by his widow, or in her default or if no widow survive him, by his children.' The fact that this specific provision was dropped in favor of the present language could imply an intention to group the widow and children together."

[9]Webster's New International Dictionary, Second Edition, Unabridged, defines "or" as: "a coordinating particle that marks an alternative; as you may read or may write . . . it often connects a series of words or propositions presenting a choice of either; as he may study law *or* medicine *or* he may go into trade." Disregarding our feelings of what he should study, it is clear that the word "or" by itself indicates a choice and nothing more—it does not indicate which choice is preferable until language is added or read into the sentence to indicate that.

[10]*Union Starch and Refining Company v. N. L. R. B.* (7th Cir., 1951), 186 F. 2d 1008, 1014, *cert. den.* 342 U. S. 815, 72 S. Ct. 30, 96 L. Ed. 617, and cases therein cited; *Tyson v. Burton* (1930), 110 Cal. App. 428, 294 Pac. 750, 752.

It has also been stated that the popular use of the words "or" and "and" is loose and frequently inaccurate and their sense is more readily departed from than that of other words.[11]

It would hardly seem probable that Congress would have used the word "or" to denote a priority as between the widow or widower and children in view of the fact that the exact same type of priority as to renewals is specifically spelled out as to all other persons or classes.

B. A Review of the Objects and Purposes of the Act Further Establishes That the Widow or Widower Was Not Intended to Be Preferred Over the Children.

The purpose of the section in question clearly "to protect widows and children from the supposed improvidence of authors in the colloquial sense."[12] The renewal right is "a new creation for the benefit (if the author be dead) of those naturally dependent upon or properly expectant of the author's bounty."[13] It could not be disputed that the children of an author normally are dependent upon or properly expectant of the author's bounty and are part of the group of those in whom he is most concerned.

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[11] *Asher v. Stacy* (1945), 299 Ky. 476, 185 S. W. 2d 958, 959; *Murphy v. Zink* (1947), 136 N. J. L. 235, 54 A. 2d 250, 253; 2 *Sutherland,* Statutory Construction (Third Ed.), page 451.

[12] *Shapiro, Bernstein & Co. v. Bryan* (2nd Cir., 1941), 123 F. 2d 697, 700.

[13] *Silverman v. Sunrise Pictures Corp., supra; cf. White-Smith Music Publishing Co. v. Goff* (1st Cir., 1911), 187 Fed. 247, 251, 253, referring to the policy of the civilized world to secure the extension of a copyright to the author or his family and also that the author or those named as the persons in whom he is most concerned should not be cut off from the rights of renewal.

Some argument has been advanced that if the widow got the entire renewal right, she would take care of the children anyway. This hardly seems a legal basis for depriving the children of their rights in these copyrights. In any event, of course, the widow or widower would not be prejudiced by having the statute *insure* that the children be provided for and that their rights in these copyrights would not be taken away. By way of analogy, we note that the various intestate succession statutes almost universally provide that the children share directly with the widow or widower in the estate.

Many examples may be given of situations illustrating the need for direct protection of the children of an author. Thus:

(a) An author may die while separated from his or her spouse although not yet finally divorced; obviously, to award the spouse the entire renewal rights would thwart the desires of the author.

(b) The deceased author may leave children of a previous marriage.

(c) The widow or widower might be improvident or incompetent in the management of money or in the disposition of the copyrights, particularly in the absence of the necessity to account to a court such as would be the case if a guardian of minor children (whether or not it be a parent) were involved.

(d) A widow or widower might remarry and come under the influence of the subsequent spouse to the prejudice of the children of the author.

(e) The widow or widower might have distorted views as to his or her own needs as compared with those of the children.

(f) The widow or widower might favor the children of a subsequent marriage entered into after the death of the author to the prejudice of the author's children.

(g) The widow or widower might, for one reason or another, be on unfriendly terms with the author's children and deprive them of their rightful share in the copyrights.

It is particularly important to note that if precedence is given to the widow or widower over the children with respect to renewals, such widow or widower gets not merely a life estate in those renewals effected by him or her, but the entire right therein.[14] If a widow or widower obtains a renewal on a copyright after the author's death, the copyright for the remaining twenty-eight years belongs to the widow or widower outright whether or not he or she survives the additional twenty-eight years. If the widow or widower dies immediately after obtaining the renewal, the copyright would go to the estate of such widow or widower and not to the author's children. The obvious injustice which would thus result from holding that a widow or widower takes precedence to the exclusion of the author's children, is further evidence that Congress did not intend such results to follow but intended

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[14]See *White-Smith Music Publishing Co. v. Goff* (1st Cir., 1911), 187 Fed. 247, 250.

the widow, widower, and children to be treated as a class for renewal purposes.

It is therefore submitted that not only the language used but a consideration of the objects and policy of the statute, as well as of equity and conscience,[15] all point to the construction that the widow, widower and children constitute a single class for renewal purposes.

II.

The Trial Court Erred in Failing to Order an Accounting by Defendant With Respect to Renewals Obtained by Her.

If it be ruled that the widow and child are to share in the renewals, then the defendant should account to plaintiff with respect to renewals already obtained by her. Where one of a class entitled to a renewal of copyright obtains the renewal for himself, he holds the same in trust for the benefit of the entire class.[16] As such constructive trustee, defendant should account to plaintiff.[17]

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[15]*S. E. C. v. C. M. Joiner L. Corp.* (1943), 320 U. S. 344, 350, 64 S. Ct. 120, 123, 88 L. Ed. 88; *United States v. Dotterweich,* 320 U. S. 277, 280, 64 S. Ct. 134, 136, 88 L. Ed. 48, rehearing denied 320 U. S. 815, 64 S. Ct. 367, 88 L. Ed. 492; *Dinkins v. Cornish* (Dist. Ct. E. D. Ark., W. D. 1930), 41 F. 2d 766, 767, 50 Am. Jur. 283 to 297.

[16]*Tobani v. Carl Fischer, Inc.* (2nd Cir., 1938), 98 F. 2d 57, *cert. den.* 305 U. S. 650, 59 S. Ct. 243, 83 L. Ed. 420; *Silverman v. Sunrise Pictures Corp., supra.* See also *Edward B. Marks Music Corp. v. Jerry Vogel Music Co., Inc.* (2nd Cir., 1944), 140 F. 2d 266, 267; *Edward B. Marks Music Corp. v. Wonnell* (Dist. Ct. S. D. N. Y., 1945), 61 Fed. Supp. 722.

[17]*Maurel v. Smith* (2nd Cir., 1921), 271 Fed. 211; *Crosney v. Edward Small Productions* (Dist. Ct. S. D. N. Y. 1942), 52 Fed. Supp. 559, 561; *Edward B. Marks Music Corp. v. Wonnell, supra.*

Conclusion.

Although the language of the renewal section of the Copyright Act could have been made more precise, nevertheless it is sufficiently plain and intelligible to spell out the intention of Congress that the widow or widower was not to be given precedence over the children of an author with respect to renewal rights accruing after the death of an author. On the contrary, the language used establishes the intention to treat them as a class entitled to participate in renewals. This intention is affirmed when the languege used is viewed in the light of the policy and purposes of this portion of the statute, which was to protect the immediate family of the author and not just his or her widow or widower. Giving preference to the widow or widower would unjustly deprive the children of their rightful share in these copyrights. The judgment of the trial court should, therefore, be reversed and it should be declared that so long as both are alive, the widow and child are equally entitled to renew copyrights originally obtained by George G. DeSylva, and that defendant should account to plaintiff with respect to those renewals already obtained by defendant since the death of George G. DeSylva.

Respectfully submitted,

FINK, LEVINTHAL & KENT,
Attorneys for Appellant.